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Interpreting Statutes Faithfully—Not Dynamically

I. INTRODUCTION

Our system of government anticipates that courts will construe and interpret statutes that legislative bodies enact. Scholars and courts have recognized a number of approaches to statutory interpretation.[1] These approaches range from originalism[2] to the more dynamic "present-oriented" interpretations.[3]

The originalist approach argues that courts, when interpreting statutes, should look to the intent of the legislature that passed the statute for guidance. Many modern scholars are calling for a departure from the originalist approach to a more dynamic method of interpreting statutes.[4] These dynamic approaches are premised upon the notion that the judicial function includes or should include the power to adapt statutes to current societal needs and values. Advocates argue that statutes are not static and should not be frozen in time at the date of their adoption.[5] These advocates do not, however, adequately recognize the strong historical legitimacy of originalism. The constitutional structure of our democratic system disapproves of any philosophy that invites calculated judicial lawmaking

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1. These same approaches are often discussed in the context of constitutional interpretation. This comment focuses only upon statutory interpretation, but many of the sources cited and arguments discussed apply equally to constitutional and statutory interpretation. Naturally, some aspects do not apply equally to both constitutional and statutory interpretation.

2. Originalism and its variations are known by many names: historicism, intentionalism, speaker's meaning interpretation, and the archeological approach. *See* Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 105 (1989).

3. *Id.*

4. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); RONALD DWORKIN, LAW'S EMPIRE (1986); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

5. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 338 (1988) ("A statute must be interpreted with an eye to what it is *becoming*, not what it was originally.").

each time a statute is interpreted. Rather it calls upon the judiciary to interpret and apply the law to cases which come before it. This interpretive function does not include the authority to brush aside legislative intent in favor of contemporary value judgments that judges might, or might not, correctly divine.

Part II of this comment gives a cursory introduction to some approaches to statutory interpretation. First, it discusses varying originalist approaches. Next, three dynamic approaches to statutory interpretation will be addressed, including a model suggested by Prof. William Eskridge, who argues for "dynamic statutory interpretation."[6]

Part III will argue that such dynamic, or present-oriented, statutory interpretation has no historical legitimacy. It will show that the judicial power granted and described in the Constitution, historically understood, requires courts to observe the intent of the legislative bodies that create statutes.

Part IV argues that, history aside, dynamic statutory interpretation is not desirable because it undermines our democratic system of government and invites judges to impose their personal values upon society. Such a system, while possibly desirable in some people's minds, lacks legitimacy and encourages government by an isolated elite—precisely what the Constitution was designed to prevent.

II. APPROACHES TO STATUTORY INTERPRETATION

A. Originalist Approaches to Statutory Interpretation

Originalism is a traditional and well-established approach to statutory interpretation. The originalist approach "asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute."[7] The Supreme Court accepts the view that the unambiguously expressed intent of legislating bodies is binding on the courts. The Court has noted: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the

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6. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Eskridge, *supra* note 4, at 1479.

7. Eskridge, *supra* note 4, at 1479-80.

matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."[8] Moreover, the Court stated: "If a court . . . ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[9] While originalists agree that intent of the legislature is controlling, they don't agree on how to determine that intent.

The mainstream originalist view looks to the text of the statute and also to reliable extrinsic sources—especially legislative history—to determine the legislature's actual intent.[10] Another view requires that intent be taken only from the text of the statute and not from inherently suspect legislative history or other sources.[11] Prof. H. Jefferson Powell argues that

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8. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); *see also* Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1108 (1983) (O'Connor, J., concurring) ("Our polestar, however, must be the intent of Congress, and the guiding lights are the language, structure, and legislative history . . . .").

9. *Chevron*, 467 U.S. at 843 n.9. This is also the historically accepted view of interpreting statutes based upon the English common law and was the view held at the time of the ratification of the Constitution. *See infra* notes 44-80 and accompanying text.

10. *See, e.g*, Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 B.Y.U. L. REV. 873, 902-07 [hereinafter Berger, *Justice Chase*]; Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1059 (1989) [hereinafter Berger, *Founders' Views*].

The Supreme Court has approved this approach of looking to both the statutory text and to extrinsic evidence of actual intent and has noted that intent in legislative history may control over even the statute's text. For example, the Court recently noted:

> "The circumstances of the enactment of particular legislation . . . may persuade a court that Congress did not intend words of common meaning to have their literal effect. . . ." Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . .

Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454-55 (1989) (citing Watt v. Alaska, 451 U.S. 259, 266 (1981)). *See also, e.g.*, United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975) ("[I]n construing these Acts against the background of their purpose, we are guided by a traditional canon of statutory construction: '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' ") (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)); Hawaii v. Mankichi, 190 U.S. 197 (1903).

11. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985). Powell's focus is on constitutional interpretation, but the arguments and evidence he relies upon generally apply to both constitutional interpretation and statutory interpretation.

this latter view was the original understanding of original intent accepted in the eighteenth century.[12]

Regardless of the historical perspective, this "textualist"[13] approach has found some acceptance. Professor (now Judge) Frank Easterbrook argues for limiting a statute's domain to cases where "the statute plainly hands courts the power to create and revise a form of common law" or "cases anticipated by its framers and expressly resolved in the legislative process."[14] While Easterbrook approves "the original-meaning approach to statutory construction,"[15] he is leery of legislative intent. "Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."[16]

For a thorough and convincing rebuff to Powell's definition of original intent, see Berger, *Justice Chase*, *supra* note 10, at 902-07; Berger, *Founders' Views*, *supra* note 10, at 1033; Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

12. Powell claims that "[c]ontemporary intentionalists are correct, therefore, in claiming that resort to 'original intent' is an interpretive strategy of great antiquity in American constitutional discourse. Despite verbal similarities, however, modern intentionalism cannot be equated with the early Republican theory." Powell, *supra* note 11, at 887. Powell recognizes that "the common lawyers, and most of the founders, thought that interpretation ought to subserve a document's [makers'] 'intent' but claims that the intent is drawn exclusively from the words of the document. H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1538 (1987). Powell asserts that while "[c]ourts treated statutes . . . by purporting to pay particular attention to the subjective intentions of their drafters[,] [t]his concern for the drafters' purposes was . . . largely illusory." Powell, *supra* note 11, at 896. *See also* Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106, 109 (1989) (Presser, in support of Powell's work, argues that Supreme Court Justice Samuel Chase and other early Federalist judges had a different view of original intent than the view espoused from President Jefferson's time on.). *But see* Berger, *Justice Chase*, *supra* note 10, at 873 & 876 (attacking Chase as "a frail foundation on which to erect a jurisprudential structure" and refuting Presser and Powell's view of original intent).

13. " 'Textualism' can be defended as the best evidence of what the legislature actually meant when it enacted the statute." Eskridge, *supra* note 4, at 1480 n.3.

14. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

15. *Id.* at 534 n.2.

16. *Id.* at 547; *see also* RONALD DWORKIN, LAW'S EMPIRE 317-27 (1986) (discussing the difficulty of finding the intent (mental state) of a collective body of legislators). Justice Scalia has expressed similar distrust of the concept of legislative intent and relies upon the text of statutes for primary guidance. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part) ("It is our task, as I see it, not to enter the minds of the Members of

Another variation of the originalist method of statutory interpretation is the "modified intentionalist" approach. This approach "uses the original purpose of the statute as a surrogate for original intent, especially when the latter is uncertain; the proper interpretation is the one that best furthers the purpose the legislature had in mind when it enacted the statute."[17] This approach finds support in a well-known, centuries-old English case—*Heydon's Case*—which requires that when interpreting statutes judges should seek the "mischief" the framers were seeking to alleviate and interpret the statute to attack that mischief.[18]

Yet another articulation of the originalist method comes from Judge Posner. He calls for a method of "imaginative reconstruction."[19] "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[20] This approach requires a careful review of the language, purpose, background, structure, and legislative history of the statute.[21] Additionally, the values and attitudes of the time the statute was passed must be considered, as well as the "legislative intent regarding the freedom with which [a judge] should exercise his interpretive function."[22] Posner's method is admittedly similar to the modified intentionalist approach of Hart and Sacks.[23]

Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code . . . ."). But see Justice Marshall's rejection of literalism in West Virginia Univ. Hosp. Inc. v. Casey, 111 S.Ct. 1130, 1148-49 (1991) (Marshall, J., dissenting) (case where "the Court uses the implements of literalism to wound, rather than to minister to, congressional intent").

17. Eskridge, *supra* note 4, at 1480. This approach, also called the "attribution of purpose" approach, was articulated earlier in this century by Hart and Sacks. 2 H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1410-17 (tent. ed. 1958) *cited in* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819 (1983). *See also* Posner, *supra*, at 819 (contrasting Hart and Sacks' approach to his own suggested approach).

18. 76 Eng. Rep. 637, 638 (Ex. 1584).

19. Posner, *supra* note 17, at 817.

20. *Id.*

21. *Id.* at 818.

22. *Id.*

23. Posner believes his approach differs from that of Hart and Sacks in that "Hart and Sacks appear to be suggesting that the judge should ignore interest groups, popular ignorance and prejudices, and other things that deflect legislators

B. Dynamic Approaches to Statutory Interpretation

One approach to statutory interpretation expressly rejecting originalism is suggested by Guido Calabresi; he suggests that courts should update and even overrule obsolete laws.[24] Calabresi explains,

> [A]t times this doctrine would approach granting to courts the authority to treat statutes as if they were no more and no less than part of the common law. At other times it would be used to enable courts to encourage, or even to induce, legislative reconsideration of the statute. Employing a variety of techniques, the courts might begin a "common law" process of renovation in the obsolete law, update the statute directly by replacing it with new rules . . . or do no more than create a situation in which conscious legislative reconsideration of the law was made likely.[25]

Another, less radical, "pragmatic" approach is suggested by Prof. Ronald Dworkin.[26] While Dworkin's approach to statutory interpretation is both present and history oriented, his history "begins before a statute is enacted and continues to the moment when [a court] must decide what [the statute] now declares."[27] Dworkin's approach requires that a statute "be read in whatever way follows from the best interpretation of the legislative process as a whole."[28] This approach sees legislative history as important "political acts" that a judge's interpretation should explain (presumably in order for the interpretation to maintain legitimacy), but the legislative history does not determine the statute's proper interpretation.[29] In short, "judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake."[30]

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from the single-minded pursuit of the public interest as the judge would conceive it." *Id.* at 819. Posner, however, would honor identifiable compromises. He argues: "But where the lines of compromise are discernible, the judge's duty is to follow them, to implement not the purposes of one group of legislators, but the compromise itself." *Id.* at 820.

24. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).
25. *Id.* at 2 (footnote omitted).
26. RONALD DWORKIN, LAW'S EMPIRE (1986).
27. *Id.* at 316.
28. *Id.* at 337.
29. *See id.* at 314-15.
30. *Id.* at 95. For brief discussions of Dworkin's model, see Smith, *supra* note

A third,[31] and even less radical, present-oriented approach to statutory interpretation is suggested by Prof. William Eskridge.[32] He calls for statutes to "be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context,"[33] especially "when the statute is old and generally phrased and the societal or legal context of the statute has changed in material ways."[34] Eskridge considers three elements most important in statutory interpretation: "(1) the statutory text . . . (2) the original legislative expectations . . . and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time."[35] Which of these three is determinative will depend upon the specific facts and circumstances of the case. For example, a judge may need to look no further than the statutory text if the question seems to be addressed there and the statute is recent. The older the statute and the more unclear the legislative history, the more important the subsequent evolution of the statute. However, even a relatively recent statute with legislative history suggesting a particular outcome may be interpreted in a different way in light of the changed societal and legal environment.[36]

III. SCOPE OF JUDICIAL POWER

Eskridge sees "no good reason" to adhere to "traditional originalist doctrine."[37] The traditional originalist doctrine, however, has deep historical roots and legitimacy which the present-oriented, dynamic models lack. This historical legitima-

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2, at 106-09 (characterizing Dworkin's theory as " 'result-oriented' jurisprudence" and "difficult to pin down"); Eskridge, *supra* note 4, at 1549-54 (characterizing Dworkin's theory as "rich and complex").

31. There are a number of other suggested present-oriented approaches to statutory interpretation that are not discussed here. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (deals exclusively with constitutional interpretation).

32. Eskridge, *supra* note 4, at 1479; Eskridge, *supra* note 6, at 1007.

33. Eskridge, *supra* note 4, at 1479.

34. *Id.* at 1481.

35. *Id.* at 1483.

36. *Id.* at 1488-94 (discussing United Steelworkers v. Weber, 443 U.S. 193 (1979), interpreting Title VII of the Civil Rights Act of 1964).

37. *Id.* at 1481.

cy means far more than simply that originalist doctrine was the first to take root and all other new approaches must fail. Originalist doctrine is embedded in our democratic framework and constitutional government. Any shift away from this doctrine has implications for our system of government. Scholars are free to advocate a better system, but that better system should be adopted through the political process, not subtly adopted by an insulated, unelected judiciary.

A. Judicial Power

The judiciary in our democratic system relies upon the Constitution for its legitimacy,[38] and its powers flow from the constitutional delegation of power.[39] Article III declares: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[40] Did this judicial power include the power for judges to ignore or disregard legislative intent in the process of statutory interpretation? Or put another way, did this power include the power for judges to update statutes or interpret them according to present values rather than the actual intent of the legislature?

Eskridge claims that:

> The irony of modern formalism is that in limiting statutory interpretation to seeking out original legislative intent, it substitutes late nineteenth century assumptions for those that the Framers would have intended to guide the "judicial Power." Intentionalist statutory interpretation is probably not what the Framers had in mind when they defined the "judicial power" in article III.[41]

Eskridge correctly recognizes that in order to understand the meaning of judicial power as constitutionalized in 1789, the established judicial traditions of that time are relevant.[42] The

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38. The issue of judicial legitimacy is addressed further in Part IV, *infra*.

39. The Constitution also provides that Congress shall have authority to help define the role of the judiciary. Congress, for example, may "ordain and establish" inferior courts. U.S. CONST. art. III, § 1. Also, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.* § 2, cl. 2.

40. U.S. CONST. art. III, § 1.

41. Eskridge, *supra* note 4, at 1502.

42. *Cf.* Presser, *supra* note 12, at 156 n.186. Presser states that "the framers'

judicial power noted in the Constitution is defined by then-existing judicial practices. However, intentionalist statutory interpretation, which Eskridge attributes to late nineteenth-century developments,[43] was firmly established centuries earlier in England and was well established in America at the time the Constitution was ratified.

1. English common law notions of statutory interpretation

In England, judges initially had broad powers and made law by declaring the common law. Early on, acts of Parliament were simply part of the common law and not necessarily binding on the courts.[44] Judges were free to extend the words of an act to cover analogous cases or to disregard the words of an act that would lead to injustice.[45] However, by the fifteenth or sixteenth century, acts of Parliament were considered binding on courts.[46]

'original intent' was that the Constitution should be interpreted in the same way that statutes were interpreted under the common law in England." *Id.*; *see also* Berger, *Justice Chase*, *supra* note 10, at 903 (agreeing with Presser on this point). If the Framers intended the Constitution to be interpreted in the same manner statutes were interpreted under the common law in England, how much more did they intend that statutes should be interpreted in the manner statutes were interpreted under the common law in England?

43. Eskridge, *supra* note 4, at 1503.

44. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 8-9 & n.9 (S. Thorne ed. 1942) [hereinafter DISCOURSE].

> Statutes were regarded in the courts as essentially isolated rulings, supplementing or modifying common law, enacted to aid the judiciary in deciding the questions of *meum et tuum* that pressed for solution, and, of more importance in the present connection, as subsisting, like the rules of the common law itself, wholly within a private-law scheme.

Id. at 9. *Cf.* S. B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 218 (1936) (by the fifteenth century, "statutory law . . . could create new law distinct from and additional to common law").

Chrimes notes that there were two categories of statutes: 1) statutes creating new law, and 2) statutes declaring what the common law is. *Id.* at 249. Chrimes acknowledges, however, that "[i]t is far from easy to multiply texts from the fifteenth century which show conclusively a recognition of new law-making by statutes." *Id.* at 252. Thus, although there is some question, by the fifteenth century the notion that statutes could create new, binding law began to gain force. *See id.* at 252-58.

45. DISCOURSE, *supra* note 44, at 4, 8-9.

46. *See id.* at 1 ("in a very real sense the history of statutory interpretation begins in the sixteenth century").

The way courts viewed statutes was important because as Parliament's role changed, so changed the judiciary's role. Once statutes were recognized as having the force of new, binding law, courts had less discretion in disregarding or applying statutory mandates. "As acts of Parliament take on the attributes of modern legislation, the intention of the legislator must grow in importance and take the place of the equity, conjectured purpose, or reason that had controlled earlier."[47] It is ironic that now, in our democratic system of government, when the binding power of legislative enactments is firmly established and undisputed, scholars should argue for giving less emphasis to legislative intent.

S. B. Chrimes affirms that "[t]he rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century."[48] Chrimes notes that Christopher St. Germain, a "learned student in the law" whose work was representative of legal thought in the fifteenth century,[49] advocated that "judges must seek the intent of the statute, not against its express words."[50] Chrimes refers to examples in fifteenth-century cases where the court found the intent of the makers of the statute conclusive.[51] He acknowledges, however, that there were still cases of courts using "discretion" to interpret statutes liberally, but "[t]here is not, indeed, visible in that period, that large latitude of discretion and that arbitrary power enjoyed by the judges of the early fourteenth century."[52] The role of judges was changing.

In the sixteenth century (circa 1587), Lord Chancellor Hatton wrote that "when intent is proved, that must be followed."[53] In fact, Hatton notes that intent is controlling even over the words of a statute.

> For when the words express not the intent of the Makers, the Statute must be further extended than the bare words; but

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47. *Id.* at 59.
48. S. B. CHRIMES, *supra* note 44, at 293 (footnote omitted).
49. *Id.* at 203-04.
50. *Id.* at 214.
51. *Id.* at 293-95. Chrimes notes specifically two cases, one of which held that "every statute made must be taken according to the intent of those that made it." *Id.* at 294.
52. *Id.* at 298-99.
53. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14 (1677).

> ever it must be thought, that the meaning of the Makers was such, when there is any proceeding other than the words bear, for it were an absurd thing to make an exposition go further than either the words, or the intention of the Statutaries reached unto . . . .[54]

Samuel Thorne explains the sixteenth-century approach: "judges must, since the words of statutes are to be extended in the light of the legislative will, approach that as closely as may be by acting as the lawmaker would have acted had the case presented for decision been brought before him rather than the court."[55] This is a classic statement of the originalist approach to statutory interpretation as practiced long before the nineteenth century or the Constitution.[56]

2. *Original intent in America*

By the eighteenth century, the accepted practice was to resort to the intent of the legislators when interpreting statutes. For example, Matthew Bacon stated in 1736:

> Such a Construction ought to be put upon a Statute as may best answer the Intention which the Makers of it had in View . . . .
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> . . . .
>
> [And echoing Dyer:] [T]hat which is within the Letter of a Statute is not within such Statute, if it be not within the Intention of the Makers thereof.[57]

American judges subscribed to the same interpretive method. James Wilson, both a Supreme Court Justice and an influential Framer of the Constitution, declared: "The first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it."[58] Another prominent

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54. *Id.* at 28-29; *accord* DISCOURSE, *supra* note 44, at 60-61 (citing both Hatton and Plowden's COMMENTARIES).

55. DISCOURSE, *supra* note 44, at 64; *accord* Heydon's Case, 76 Eng. Rep. 637, 638 n.(B) (Ex. 1584) ("[T]he intention of the Legislature is the best method to construe the law".).

56. For additional common law citations requiring resort to actual intent, see Berger, *Justice Chase*, *supra* note 10, at 903-04; Berger, *Founders' Views*, *supra* note 10, at 1059-65; Berger, *supra* note 11, at 298-308.

57. 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 647-48 (3d ed. 1768), *quoted in* Berger, *supra* note 11, at 305.

58. 1 THE WORKS OF JAMES WILSON 75 (R. McCloskey ed. 1967). *See id.* at 2

early Supreme Court Justice, Joseph Story, also signified commitment to intentionalism. "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties."[59] Professor Powell agrees that "the common lawyers, and most of the founders, thought that interpretation ought to subserve a document's intent."[60]

Eskridge looks to Sir William Blackstone for support of his contention that the Framers and the lawyers of the eighteenth century did not consider themselves bound by legislators' intent.[61] Eskridge recognizes that

> [w]hile Blackstone did not fully appreciate the creative role of judges, neither did he advocate slavish devotion to original intent. . . . To the extent that Blackstone had a theory of statutory interpretation, it was that judges should enforce the textual commands of statutes, though not to the detriment of the statute's overall purposes and the current demands of equity.[62]

True, Blackstone looks to equity in interpreting statutes with dubious words; but equity *is* an attempt to apply the law consistently with the legislators' intent.[63] Blackstone notes why equity is justified: "For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circum-

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(noting Wilson was one of the original Supreme Court Justices); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 197 (1925) (noting Wilson's stature as a leading Framer of the Constitution).

59. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 181 (reprinted ed. 1987) (abridged ed. 1833). Raoul Berger notes that while Story attacked intentionalism, he fell in line with the common law authorities and accepted it. Berger, *supra* note 11, at 320.

60. Powell, *supra* note 12, at 1538.

61. Eskridge, *supra* note 4, at 1502.

62. *Id.*

63. *See, e.g.*, DISCOURSE, *supra* note 44, at 64-65. Thorne notes that in the seventeenth century equity was "often synonymous with the actual or presumed intention of the makers as revealed by the act." *Id.* at 65. According to Coke:

> *Equitie* is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-makers could not possibly set downe all cases in expresse terms.

Id. at 64 n.136 (citing Coke).

stances, (which had they been foreseen) the legislator himself would have expressed."[64] Moreover, Blackstone cautions against the excessive use of equity as tending to "destroy all law" and making "every judge a legislator."[65]

Blackstone was firmly in the originalist camp. When interpreting statutes, he advocated seeking the intent of the legislators, and "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made . . . ."[66] One method for determining the legislator's intent is by looking to the "cause which moved the legislator to enact [the law]."[67]

Blackstone believed that an unreasonable collateral matter arising out of a statute could be expounded by equity, because such a matter was likely unforeseen by the legislator.[68] But if there is evidence of the legislator's intent to that result, "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no."[69] Blackstone required strict adherence to parliament's intent. Blackstone's work does not even hint of judges updating statutes or applying present values in interpreting statutes.

Eskridge also points to Alexander Hamilton, a leading Framer of the Constitution, for the proposition of more expansive judicial power than originalists would allow.[70] While Hamilton, in *The Federalist* No. 78, did argue that the judiciary had the power to "mitigat[e] the severity and confin[e] the operation" of "unjust and partial laws" to prevent "iniquitous intention[s]" of legislators,[71] he seems to be referring to a small number of exceptional bills singling out particular groups for either benefits or burdens. He was not advocating a judicial

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64. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *61-62; *accord* C. HATTON, *supra* note 53, at 28 (equity is going beyond the words to effectuate intent).

65. 1 BLACKSTONE, *supra* note 64, at *62.

66. *Id.* at *59.

67. *Id.* at *61.

68. *Id.* at *61-62

69. *Id.* at *91. Blackstone recognized the absolute authority of the legislative branch. "True it is, that what the parliament doth, no authority upon earth can undo." *Id.* at *161. This of course differs from our system of government in which courts can strike down legislative enactments which are unconstitutional.

70. Eskridge, *supra* note 4, at 1502-03.

71. THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

role that frequently would turn from the intent of the makers of the law and seek to update them or adjust them to modern notions of public values.[72] Hamilton also recognized that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case."[73] Loosing statutes from the intent of the legislators which passed them would free the courts and allow arbitrary discretion.[74]

Whatever Hamilton meant by his comments about a judge's power to mitigate laws, his views of the judiciary were perhaps not universally held. Max Farrand notes that Hamilton "was aristocratic rather than democratic" and many of his ideas "were too radical for the [constitutional] convention."[75] Hamilton's aristocratic tendencies may have caused him to advocate a judicial role greater than that which was generally accepted.[76] In *The Federalist* No. 78, Hamilton also argued strongly for the power of judicial review. This view was later adopted, but at the time it was far from universally accepted.[77]

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72. The power Hamilton envisioned was to "safeguard against the effects of occasional ill humors in society." *Id.* at 470. This power against occasional ill-humors is a far cry from the dynamic interpretation advocated today. Hamilton recognized the judicial branch as "beyond comparison the weakest of the three departments of power," *id.* at 465-66, and wrote, "[t]he judiciary . . . can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment. . . ." *Id.* at 465.

73. *Id.* at 471.

74. *See* Smith, *supra* note 2.

75. FARRAND, *supra* note 58, at 197.

76. Compare Hamilton's view with the view of Iredell, a well-respected early Supreme Court Justice. Justice Iredell, quoting Blackstone, argued that "there is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no." Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798). *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 57-58 (1985) (Speaking of the early Supreme Court Justices, "[a]s far as the individual Justices are concerned, Paterson and Iredell seem the most impressive.").

77. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of judicial review); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 9 (1971) (the power of judicial review was not clearly accepted, though Hamilton and others strongly believed in it); DAVID M. BILLIKOPF, THE EXERCISE OF JUDICIAL POWER 1789-1864 31-39 (1973) (discussing decisions leading up to *Marbury*).

3. *Judicial power in the Constitution*

Admittedly the Constitution does not clearly define "judicial Power." Gouverneur Morris, a leading Framer who worked on the final drafting of the Constitution,[78] recalled that the Constitution was clear except as to the role of the judiciary, which was intentionally left unclear due to the conflicting opinion surrounding it.[79] This controversy probably centered around the power of judicial review. If the convention could not agree upon even whether the power of judicial review, which allows judges to overrule statutes, was consistent with the Constitution, how likely were they to have agreed to the notion that judges could disregard legislative intent and apply the judges' own views of contemporary public values in its place? Justice Iredell, a strong supporter of judicial review, was also a strong supporter of following original intent.[80]

B. Separation of Powers

The role of the judicial branch is to interpret the law—not make the law. While this statement is openly ridiculed,[81] the basic notions underlying it retain their force. Indeed, judges "create" law to some extent through the common law.[82] Courts

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78. Gouverneur Morris' "best work in the convention was as the member of the committee on style and arrangement to whom was entrusted the final drafting of the constitution." MAX FARRAND, FRAMING OF THE CONSTITUTION, *supra* note 58, at 199.

79. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 420 (Max Farrand ed., rev. 1966) (1911) [hereinafter RECORDS].

80. *See supra* note 76.

81. *See, e.g.*, William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211, 212 (1982).

82. Common law judges did not consider themselves lawmakers. "The English Common Law, evolved over centuries by judges who felt a strong obligation to decide in accordance with the law. Judges in this system did not feel that they were making law. Instead, they were discovering, from past decisions, the present state of the law." CARROL D. KILGORE, JUDICIAL TYRANNY 15 (1977). Note also Justice Rehnquist's observation about federal courts' common law authority: "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." City of Milwaukee v. Illinois 451 U.S. 304, 312 (1981). Rehnquist acknowledges that "the court has found it necessary, in a 'few and restricted' instances, to develop federal common law." *Id.* at 313 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

fill gaps in the law by using the language of related or analogous statutes, legislative intent and precedent as their guide. When statutes are silent, carefully following common law precedents differs radically from allowing judges to reject intent and change statutes based upon judicially defined contemporary public values.

1. Separation of powers as intended by the Framers

The Constitution created three separate and distinct branches of government. The legislative power was vested in the Congress (the legislative branch).[83] The executive power was vested in the President (the executive branch).[84] And, as noted earlier, the judicial power was vested in the Supreme Court and such inferior courts as Congress might create. The need for separation of the branches was articulated by Montesquieu and accepted by the Framers.[85]

In creating a limited judiciary, the Framers' distrust for judicial involvement in legislating was evident.[86] At the constitutional convention, a proposal for the inclusion of members of the judiciary in a "council of revision" (with the power to veto laws passed by the legislative branch) was defeated three times.[87] Despite support by Madison, Wilson, Ellsworth and

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83. U.S. CONST. art I, § 1 states that "[a]ll legislative Powers herein granted shall be vested in a Congress." Article I defines the legislative powers broadly. *See id.* art. I, §§ 7-8 (Note especially Section 8: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . .").

84. *Id.* art. II.

85. *See* THE FEDERALIST, No. 47 300, 307 (James Madison) (Clinton Rossiter ed., 1961); 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 185 (Legal Classics Library 1984) (1751) ("Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers."); FARRAND, *supra* note 58, at 49 (Montesquieu's "writings were taken as political gospel"); Myers v. United States, 272 U.S. 52, 116 (1926) (Montesquieu's view of separation of powers had the Framers' full approval); *see also* PAUL M. SPURLIN, MONTESQUIEU IN AMERICA 1760-1801 5-45 (Octogon Books 1969) (1940) (discussing differing opinions and evidence regarding Montesquieu's influence on the Framers).

86. *See, e.g.*, Berger, *Justice Chase*, *supra* note 10, at 892-93 (citing Framer and Supreme Court Justice James Wilson, acknowledging distrust of the judiciary); Berger, *supra* note 11, at 310-11 (noting American fear of a strong judicial branch); Powell, *supra* note 11, at 892 (Early Americans feared that "the judiciary could undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts.").

87. 1 THE CONSTITUTION AND THE SUPREME COURT 79-83 (Louis H. Pollak ed.,

G. Morris, opponents, including Gerry, Dickinson, Martin,[88] Rutledge and Gorham, carried the day by calling such judicial involvement "an improper mixture of powers."[89] Dickinson feared that allowing judges to set aside laws would eventually lead to their becoming the lawgivers.[90] Gerry cautioned against "sanction & seduc[tion] by the sophistry of Judges."[91] Martin considered judicial involvment in vetoing legislation "a dangerous innovation."[92]

The Framers and ratifiers were careful not to vest too much power in the judiciary because they recognized that courts are inherently oligarchic and insulated from the democratic process.[93] The Framers and early Americans had a distrust for aristocracy—"the govern[men]t of the few over the many."[94] Hamilton was compelled to assure people that the judiciary was the weakest branch and no threat to their liberty.[95]

Eskridge argues that "our constitutional system of government was not meant to be one of rigid separation of powers or pure majoritarianism," and therefore, "judicial lawmaking from statutes has a constructive role to play."[96] While the Framers recognized some inevitable overlap between the three branches, these were limited exceptions and not the rule.[97] The Supreme

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1966) [hereinafter THE CONSTITUTION]; 1 RECORDS, *supra* note 79, at 138-40.

88. Dickinson, Gerry and Martin's most significant contribution to the Constitutional Convention, as Farrand notes, "was rendered in restraining the tendency of the majority to overrule the rights of states and individuals in endeavoring to establish a thoroughly strong government." FARRAND, *supra* note 58, at 200. Their strong voices against an expansive role for the judiciary is consistent with their distrust for a strong central government.

89. 1 RECORDS, *supra* note 79, at 140 (words of Dickinson).

90. 1 THE CONSTITUTION, *supra* note 87, at 83.

91. 1 RECORDS, *supra* note 79, at 139.

92. 2 *Id.* at 76; THE CONSTITUTION, *supra* note 87, at 81.

93. *See* American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 555-56 (1949) (Frankfurter, J., concurring) (noting that courts are inherently oligarchic and non-democratic; also noting Jefferson's distrust of the courts).

94. 2 RECORDS, *supra* note 79, at 224 (citing George Mason); *see* Berger, *Justice Chase*, *supra* note 10, at 875 (citing a number of Framers condemning aristocracy).

95. THE FEDERALIST No. 78, *supra* note 71, at 465-66. The judiciary "may truly be said to have neither FORCE nor WILL but merely judgment." *Id.* at 465.

96. Eskridge, *supra* note 4, at 1498.

97. *See* Berger, *Founders' View*, *supra* note 10, at 1081-82 (" 'blendings' constituted exceptions to the rule"). Madison said: "[I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 1 ANNALS OF CONG. 581 (Joseph Gales ed., 1789).

Court has recognized this principle: "[T]he branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."[98] So important was this separation of powers that in an early nineteenth-century case, Chief Justice Marshall held that Congress could not delegate legislative power to the judicial branch.[99] In a case essentially contemporaneous with the ratification of the Constitution the Court noted "[t]hat by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose encroachments on either."[100]

2. *The judge's role—to interpret the law*

The accepted rule at the time of the the Constitution's ratification was that judges should interpret the law—not make the law.[101] James Wilson, a Framer and Supreme Court Justice, "instructed a judge to 'remember, that his duty and his business is, not to make the law, but to interpret and apply it.' "[102] Another Framer, John Dickinson, at the Constitutional Convention emphasized that the judiciary is the "expounder"

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98. Myers v. United States, 272 U.S. 52, 116 (1926); *accord, e.g.*, Mistretta v. United States, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); Reynolds v. Sims, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting) (The Supreme Court "does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process.").

99. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); *accord Mistretta*, 488 U.S. at 371-72 (1989). The Court in *Wayman* also noted: "It is the office of the legislator to prescribe the rule, and of the judge to apply it . . . ." *Wayman*, 23 U.S. at 14.

100. Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n."+" (1792); *see also* West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1148-49 (1991) (Marshall, J., dissenting) ("[T]he Court uses the implements of literalism to wound, rather than to minister to, congressional intent in this case. That is a dangerous usurpation of congressional power when any statute is involved.").

101. *See* Berger, *supra* note 11, at 310-11 & n.107 ("From Francis Bacon [1561-1626] on, the function of a judge has been to interpret, not make, law."); *see also* Berger, *Justice Chase*, *supra* note 10, at 904 (citing Matthew Bacon (1736) requiring construction according to intention of statute's makers).

102. 2 THE WORKS OF JAMES WILSON 502 (R. McCloskey ed. 1967), *cited in* Berger, *supra* note 11, at 311 n.107.

of the law[103] and cautioned against the judiciary becoming the lawgiver.[104] Dickinson recognized that "[j]udges must interpret the Laws[;] they ought not to be legislators."[105] Similarly, Charles Pinckney "opposed the interference of the judges in the legislative business."[106] In harmony with these Framers' views regarding the legislative function, "in the entire Constitution there is no word, no hint, not the slightest basis for any inference that any of the law-making power vested in Congress may be exercised by any other body."[107]

The English legal authorities of the middle and late eighteenth century were in accord with this American view. By Blackstone's day, "Parliament became the sovereign and the duty of the judge was recognized to be merely to determine what Parliament has said and to 'apply' it, omitted particulars could no longer be supplied, since that would amount to a usurpation of or incroachment upon the power of the legislature."[108]

The federal courts have often recognized their role as interpreters of the law and not makers of the law.[109] The Supreme Court recognizes separation of powers concerns and the judiciary's proper role as interpreters of the law. Chief Justice Burger stated:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto . . . .
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> . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with

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103. 1 RECORDS, *supra* note 79, at 110.
104. *See supra* note 90, and accompanying text.
105. 1 RECORDS, *supra* note 79, at 108.
106. 1 THE CONSTITUTION, *supra* note 87, at 82.
107. KILGORE, *supra* note 82, at 190.
108. DISCOURSE, *supra* note 44, at 67; *see also id.* at 67 n.143, 91-92.
109. *See, e.g.*, Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1066 (D.C. Cir. 1981) ("[I]t is our job to interpret the law as we believe Congress meant it to be read."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J. dissenting) ("The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation.").

> "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.[110]

Thus, a judge's role since the time of the ratification of the Constitution has not included dynamic lawmaking. The Constitution requires strict separation of powers and denies the judicial branch the power to legislate.

IV. DYNAMIC STATUTORY INTERPRETATION ON ITS MERITS

Historical arguments aside, why is a dynamic statutory model unjustified? Why shouldn't judges update or make law? The concern most frequently and vigorously raised is that judges are not elected and are isolated from the will of the people. As a result, a small number of people not accountable to the citizenry are able to set policy, define values, and impose laws against the popular will. These imposed laws inherently lack legitimacy. Laws without legitimacy undermine public respect for the rule of law, and the entire political system suffers.

Ours is a government for the people, by the people.[111] The people, through their elected leaders, determine policy and impose laws. Taking that power from the people leads to goverment by the few over the many—aristocracy.[112] True, ours is not tyranny of the majority either; checks and balances in the Constitution as well as provisions in the Bill of Rights provide protection to minorities against the majority. But the bedrock value remains—the people must be allowed to govern themselves.

Appointed judges with life tenure are not politically accountable, nor should they be.[113] Judges must exercise their independent judgment when applying the law. Lawmakers, on the other hand, should be accountable and subject to removal for their judgment errors. A judge is rarely removed from office—and probably never for mere judgment errors.

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110. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978). *See also* Posner, *supra* note 17, at 818 ("It is not the judge's job to keep a statute up to date in the sense of making it reflect contemporary values . . . .").

111. *See* DECLARATION OF INDEPENDENCE ("[G]overnments are instituted among Men, deriving their just powers from the governed.").

112. *See supra* note 94, and accompanying text.

113. Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring) ("[U]nelected and lifetenured judges . . . have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will.").

Justice Frankfurter recognized these democratic concerns. As Frankfurter noted, courts are "non-democratic," "inherently oligarchic," and "removed from democratic pressures."[114] He recognized that

> [t]he Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. . . . It is by . . . vigilance over its representatives that democracy proves itself.[115]

Lawmaking and policymaking should be left to the legislative branch. Leaving lawmaking to the most democratic branch of government encourages the people collectively to take responsibility for government. Then, when legislators make mistakes, people take some responsibility themselves because the legislators are popularly elected. This differs significantly from a judge who might err. When people perceive that a judge has erred, they feel no responsibility and instead feel frustration and anger at their inability to alter the unsatisfactory decision.

Proponents of dynamic statutory interpretation might respond by noting that, at least in cases of purely statutory interpretation, the people through their legislature can override a poor judicial decision that creates new law. However, the practical obstacles to quick efficient responses by legislatures are significant. A legislature has finite time and resources and makes judgments how to best allocate these scarce resources. The judiciary should not determine a legislature's priorities by improperly provoking legislative responses through judicial interference.

The people through the democratic process are responsible for their legislators, and therefore, these legislators' policy choices and enactments enjoy legitimacy. Laws or values imposed by judges do not share that legitimacy. Although many people speak of legislatures and Congress as if they have no

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114. American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 555-56 (1949) (Frankfurter, J., concurring).
115. *Id.*

input or control over the job those legislators are doing, subconsciously, if not consciously, people realize that the people *collectively* are responsible for their legislators.

Furthermore, the democratic system is damaged when judges seek to interpret statutes dynamically because legislators may have additional disincentive to attack challenging and controversial issues. They may abrogate their legitimate role and encourage politically insulated judges to make difficult policy choices that may cause popular outcry. This would remove government even further from the people. People too may become more lax and less vigilant in selection and oversight of their elected representatives. A society that is already in many respects politically anemic[116] should avoid moving government further from the people. Moreover, people may try to pressure courts for changes rather than their elected representatives.[117]

Eskridge argues that judges are well suited to make law and value judgments.[118] Although he recognizes that allowing judges to function as lawmakers is counter-majoritarian, Eskridge argues that "the legislature acting alone will be subject to three biases which undermine the overall legitimacy of government: failure to enact or update public interest laws, avoidance of hard choices, and favoritism directed at power groups."[119] To counteract these biases, Eskridge argues for a system wherein judges construe statutes dynamically and have authority to update public interest laws and satisfy the first concern. As to avoidance of hard choices and favoritism, Eskridge says courts "can at least inject a dynamic deliberative process into statutes," a process "which is broadly responsive to the common good."[120]

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116. Note the endemic low voter turnouts in elections and general lack of knowledge about or interest in important proposed legislation.

117. Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring). Scalia wrote:

> [O]ur retaining control . . . of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us . . . to follow the popular will.

118. Eskridge, *supra* note 4, at 1529-38.

119. *Id.* at 1530.

120. *Id.* at 1532-33.

How judges decide what the common good is, however, requires making policy decisions that are properly left to the people to decide—not to a small group of generally affluent, well-educated judges. An open invitation for judges to impose their own values in the guise of contemporary public values for the common good is unsettling because it invites government by an isolated elite. Taking the power away from the people, even if by small steps, is a serious matter, not to be taken lightly.

V. CONCLUSION

There are a number of approaches to statutory interpretation including both originalist approaches and dynamic approaches. This comment has argued that whatever approach the courts apply in practice, the traditional originalist approach, emphasizing express language and legislative intent, is the most appropriate approach to statutory interpretation in our constitutional framework. Judges should not expand their authority by updating statutes. The Framers intended that the judicial branch be confined to interpreting the law according to the intent of the makers of the law and did not approve of a judicial power that included dynamic statutory interpretation. Far from being a late nineteenth-century creation, originalism was well established in both the English common law and the assumptions that are included in the Constitution.[121]

Separation of powers requires that the judicial branch abstain from infringing upon the legislative branch. Requiring this separation allows the most democratic branch—Congress (or state legislatures)—to make policy decisions and impose laws. The power thus remains in the people. Encouraging judges to update laws or to include their notions of contemporary

121. It is indeed ironic that in order to justify originalism in statutory interpretation this comment has sought guidance from the original intent of the Framers. Ironic though it may be, such an approach is logical. Our system gains its legitimacy from the Constitution, which was framed and ratified by the people in 1789. To discover what the people agreed to by that ratification, one must look, not to what would be a good idea today, or how the Constitution is interpreted today, but instead to what the people then believed they were agreeing to. Some laws and principles exist today which were not agreed to in 1789 and for these one must search for their legitimacy in subsequent history. This comment argues that models of dynamic statutory interpretation cannot claim their legitimacy from the Constitution, and therefore must find it in some other source, if at all.

public values at the expense of legislative intent would encourage government by an isolated elite. Power should remain in the people.

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